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Rules 11 of the Federal Rules of Criminal Procedure: A New " Strict in Context" Approach

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RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: A NEW "STRICT IN CONTEXT" APPROACH

Guilty pleas and the often associated plea bargains are a dominant force in the federal courts today.[1] The great majority of federal defendants plead guilty rather than going to trial.[2] Indeed, it is doubtful that the federal court system could function today without guilty pleas, given the requirements imposed by the Speedy Trial Act.[3] Not only does the criminal justice system now rely on guilty pleas for efficient administration,[4] it also may depend on these pleas to insure a more effective and just system by guaranteeing prompt correctional measures,[5] helping to preserve a true presumption of innocence,[6] and facilitating prosecution of more serious offenders.[7]

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[1] *See* Blackledge v. Allison, 431 U.S. 63 (1977). "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Id.* at 71. In Santobello v. New York, 404 U.S. 257 (1971), the Court called plea bargaining "an essential component of the administration of justice. Properly administered, it is to be encouraged." *Id.* at 260.

[2] For the twelve month period ending June 30, 1980, 80.8% of federal convictions (63.2% of defendants) occurred on pleas of guilty or nolo contendere. 1980 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 97, Tables 44 and 45 at 98, Table D-4 at A-75. For the period ending June 30, 1979, 82.9% of federal convictions (66.3% of defendants) occurred on pleas of guilty or nolo contendere. 1979 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 107, Table 55 at 108, Table D-4 at A-69.

[3] Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified at 18 U.S.C. § 3161 (1976)). The Act requires that trials of federal defendants be started within 70 days of the filing of the information or indictment or of an appearance before a judicial officer of the court in which a charge is pending, whichever occurs last. This time limit is subject to certain designated periods which may be excluded from the computation. *Id.* at § 3161(c).

[4] *See, e.g.*, Notes of Advisory Committee on 1975 Amendments to Rules, FED. R. CRIM. P. 11, *reprinted in* 18 U.S.C. app. 1417, 1419 (1976) [hereinafter cited as 1975 *Advisory Committee Notes*]; U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 10 (1967) [hereinafter cited as *Task Force Report*]; Note, *Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 881-82 (1964) [hereinafter cited as Note, *Guilty Plea Bargaining*]. For another view, see a study of Connecticut's criminal courts which rejects the theory that plea bargaining is a function of case overload. M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1978). This study points out ". . . that variations in case pressure do not directly and appreciably affect trial rates — historically, low volume courts have not tried significantly more cases, and recent decreases in volume have not led to markedly greater rates of trial." *Id.* at 31. Instead, the author views plea bargaining as inextricably bound to trial courts and an inevitable practice in the local criminal court. *Id.* at 32, 157, 162.

[5] 1975 *Advisory Committee Notes*, *supra* note 4, at 1419; *See also* Santobello v. United States, 404 U.S. 257, 261 (1971).

[6] *Task Force Report*, *supra* note 4, at 10; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PLEAS OF GUILTY, p. 299 (1974).

[7] 1975 *Advisory Committee Notes*, *supra* note 4, at 1419; Note, *Guilty Plea Bargaining*, *supra* note 4, at 879 (1964).

In accepting the reality of the plea bargaining system, both the courts and Congress have had to address occasionally conflicting concerns. In order to safeguard defendants' constitutional rights in a consistent manner, the plea procedure must be sufficiently detailed and complete to insure that the plea is informed and voluntary, and the procedure must be routinely followed.[8] Nevertheless, the judicial system must not be unduly burdened by frivolous appeals and reversed convictions arising from claims of noncompliance with these procedures. Thus, the finality and efficiency of the plea procedure must be preserved while defendants' rights are uniformly and routinely protected.

Congress' concern with insuring that guilty pleas are informed and voluntary is represented by Rule 11 of the Federal Rules of Criminal Procedure, which prescribes the procedures for accepting guilty pleas in the federal courts.[9] This rule has presented the courts with a two-pronged issue — first, what constitutes compliance with the rule, and second, whether failure to comply with it should result in *per se* reversal of a conviction. The original version of the rule required only that the trial judge determine that the plea was entered into voluntarily with an understanding of the nature of the charge.[10] Rule 11 was amended in 1966 to require, in addition, that the defendant be addressed personally, that the defendant understand the consequences of the plea, and that the court be satisfied that a factual basis for the plea exists.[11]

The circuit courts of appeal took a variety of positions on the effect of noncompliance with both the original and amended versions of the rule. Most circuits held that when the district court did not fully comply with Rule 11, the case had to be remanded for an evidentiary hearing to determine whether the plea was made knowingly and voluntarily, if such a determination could not be made from the record.[12] Other circuits shifted the burden to the government to prove that the plea was entered into voluntarily with an understanding of the

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[8] Kercheval v. United States, 274 U.S. 220 (1927).

> A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

Id. at 223.

[9] FED. R. CRIM. P. 11.

[10] The original Rule 11 provided in full:

> A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Fed. R. Crim. P. 11, 327 U.S. 842 (1946).

[11] Fed. R. Crim. P. 11, 383 U.S. 1097 (1966). For the full text of the rule, see note 27 *infra*.

[12] Kennedy v. United States, 397 F.2d 16 (6th Cir. 1968), *cert. denied*, 394 U.S. 1018 (1969); United States v. Del Piano, 386 F.2d 436 (3d Cir. 1967), *cert. denied*, 392 U.S. 936 (1968); Stephens v. United States, 376 F.2d 23 (10th Cir. 1967), *cert. denied*, 389 U.S. 881 (1967);

charge.[13] Finally, one circuit held that if the district court did not fully comply with Rule 11, the guilty plea had to be set aside and the defendant given an opportunity to plead again.[14]

In *McCarthy v. United States*,[15] the Supreme Court finally addressed itself to the dispute that existed among the circuits over the remedy for noncompliance with the rule.[16] The *McCarthy* Court held that a defendant is entitled to have his conviction vacated and to plead again if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11.[17] In adopting a mechanical rule of reversal and rejecting the case-by-case evidentiary approach, the *McCarthy* Court opted for a process which, it was hoped, would insure consistent protection of defendants' rights.[18] This procedure was also intended to reduce the long term burden on the judicial system, notwithstanding the short term interference with the finality of the plea procedure which would result from a rule of automatic reversal.[19]

After *McCarthy*, the remedy for noncompliance with Rule 11 remained clear until the rule was amended again in 1975.[20] This amendment significantly expanded the rule by prescribing the advice that a court must give in order to insure that a defendant makes an informed plea.[21] This version of the rule explicitly lists the subjects that a court must address, including the constitutional rights being waived by the defendant in making his plea.[22]

As a result of the 1975 amendment, the circuit courts have again developed different approaches to deal with the consequences of noncompliance with the rule. In addition, they have adopted varying interpretations of what constitutes compliance with the revised version of the rule. The central point of disagreement among the circuits is whether the strict *McCarthy* rule applies with the same force to the detailed and lengthy amended Rule 11 as it did to the 1966 version of the rule. Some courts have held that there must be literal compliance with amended Rule 11 and that if a plea is accepted

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Brochaw v. United States, 368 F.2d 508 (4th Cir. 1966), *cert. denied*, 386 U.S. 996 (1967); Bone v. United States, 351 F.2d 11 (8th Cir. 1965); United States v. Lester, 247 F.2d 496 (2d Cir. 1957); United States v. Davis, 212 F.2d 264 (7th Cir. 1954).

[13] Halliday v. United States, 380 F.2d 270 (1st Cir. 1967), *aff'd on other grounds*, 394 U.S. 831 (1969) (Court refused to apply *McCarthy* retroactively); Rimanich v. United States, 357 F.2d 537 (5th Cir. 1966).

[14] Heiden v. United States, 353 F.2d 53 (9th Cir. 1965).

[15] 394 U.S. 459 (1969).

[16] The Court made this decision in its supervisory role over the federal courts rather than based on any constitutional issues. The Court did discuss, however, the waiver of constitutional rights inherent in a guilty plea and the potential for violation of due process. *Id.* at 464.

[17] *Id.* at 463-64.

[18] *Id.* at 471-72.

[19] *Id.* at 472.

[20] Federal Rule of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, 89 Stat. 371 (codified at 18 U.S.C. § 3771 (1976)). For a brief description of the history of rule 11 and a complete description of the 1975 changes, *see* Note, *Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases*, 44 FORDHAM L. REV. 1010 (1976).

[21] FED. R. CRIM. P. 11(c).

[22] *Id.*

without strict adherence to the rule, the conviction must be reversed and the defendant allowed to plead again.[23] Other courts have determined that ritualistic compliance with all of Rule 11 is unnecessary. Instead, these courts have required only substantial compliance with Rule 11, such that the core concerns of the pre-*McCarthy* rule are addressed.[24] Specifically, under this view, the judge must address the defendant personally and determine that the plea is voluntary and informed and that the defendant has knowledge of the consequences of the plea. If the record does not establish this substantial compliance, the guilty plea will be set aside. Furthering the confusion created by these different standards, many circuits do not adhere to the standards they adopt. Often, the courts have narrowed or broadened their definition of compliance to fit the circumstances of a case and to achieve the desired result.[25] The Supreme Court has not yet addressed the dispute among the circuit courts as to whether, on direct appeal, the *McCarthy* standard extends to revised Rule 11.[26]

This note will examine the problems inherent in each of the approaches taken by the courts. First, the note will present *United States v. McCarthy* and summarize the 1975 amendments. Next, it will present the different standards that have been advanced by the circuits for review of judicial compliance with Rule 11, as amended in 1975. Included will be a discussion of some representative cases and an analysis of the extent to which the results comport with the circuit's announced standard. This note then will consider the policy issues that shape the legal question, and will analyze the strengths and weaknesses of the existing standards. This analysis will be followed by a discussion of a proposed change to the rule — a change which is intended to resolve this issue. It will be submitted that none of the approaches utilized or proposed deals adequately with the problem. Only strict adherence to Rule 11 comports with the

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[23] United States v. Del Prete, 567 F. 2d 928 (9th Cir. 1978); United States v. Journet, 544 F.2d 633 (2d Cir. 1976); United States v. Boone, 543 F.2d 1090 (4th Cir. 1976). The issue has not yet been settled in the Third Circuit. In United States v. Carter, 619 F.2d 293 (3d Cir. 1980), however, the court suggested that continued deviations from Rule 11 which result in appeals might require the adoption of a standard of strict compliance with automatic reversal for each violation of the rule.

[24] United States v. Dayton, 604 F.2d 931 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); United States v. Lambros, 544 F.2d 962 (8th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977). It is not entirely clear which approach the Seventh Circuit has adopted. The language in United States v. Fels, 599 F.2d 142, 149 n.6 (7th Cir. 1979) indicates that the court expects strict compliance with the rule. In United States v. Gray, 611 F.2d 194 (7th Cir. 1979), *cert. denied*, 446 U.S. 911 (1980), however, the court determined that a literal reading of Rule 11 would exalt form over substance and that therefore, on the facts of that case, the rule had not been violated. *Id.* at 202.

[25] Thus, in United States v. Gray, 611 F.2d 194 (7th Cir. 1979), it is not clear whether this court, eager not to vacate the plea on the facts of this case, stretched the reading of Rule 11 as far as possible or whether they actually adopted a substantial compliance standard. *See also* United States v. Saft, 558 F.2d 1073 (2d Cir. 1977); United States v. Michaelson, 552 F.2d 472 (2d Cir. 1977).

[26] The Court has ruled that a conviction based upon a guilty plea is not subject to *collateral attack* when all that is shown is a failure to comply with the formal requirements of Rule 11. United States v. Timmreck, 441 U.S. 780 (1979).

legislative intent in the passage of the 1975 amendments, the policy served by the rule, and the mandates of the Supreme Court decisions in the area. Nevertheless, adopting an unwavering strict compliance, automatic reversal standard leads to practical problems in the application of the standard. This note will therefore propose a new standard which follows the intent of the rule and the *McCarthy* decision and which can be applied consistently without producing unreasonable results. This standard can be used currently by the appellate courts in reviewing judicial compliance with the rule and in the future can be incorporated as a standard into Rule 11.

I. BACKGROUND: *MCCARTHY* AND THE REVISIONS TO RULE 11

A. *McCarthy v. United States*

In order to understand the problem currently confronting the courts, it is necessary first to examine how the *McCarthy* Court construed Rule 11 and the 1966 amendments,[27] and then to explore the reasons for and scope of the 1975 amendments. In *McCarthy*, the trial judge failed to inquire personally if the defendant understood the nature of the charge against him.[28] The *McCarthy* Court considered whether this failure violated the 1966 version of Rule 11 and what the effect of noncompliance with the rule should be. Rule 11 provided that the trial judge was to address the defendant personally and determine that the plea was made voluntarily with understanding of the nature of the charge. The rule further provided that the trial court was to decide whether a factual basis existed for the plea.

In determining if the judge complied with Rule 11, the *McCarthy* Court initially identified the two purposes of the rule. The Court found that one purpose was to help the district court judge in making the constitutionally required determination that the defendant's plea was voluntary.[29] The Court noted that inherent in the voluntariness requirement is a need for the plea to be informed and for the defendant to understand the relation of the law to the facts.[30] The

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[27] The text of the rule, with the 1966 amendments in italics, is as follows:

> A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept *such* plea *or a plea of nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea*. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*

Fed. R. Crim. P. 11, 383 U.S. 1097 (1966).

[28] *See* 394 U.S. at 461-63.

[29] *Id.* at 465.

[30] *Id.* at 466. Although the Court did not hold that compliance with Rule 11 is constitutionally required, the court reasoned that the purposes of the rule arise from the waiver of constitutional rights inherent in a guilty plea. *Id.* In order to have a valid waiver of a defendant's privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers, due process requires that the waiver be "an intentional relinquishment of abandonment of a known right or privilege." *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

second purpose of the rule, according to the Court, was to insure that a complete record be made of the factors related to the voluntariness determination, thus enabling the courts to dispose quickly of any collateral attacks on the validity of guilty pleas.[31]

The *McCarthy* Court noted that the requirements of Rule 11 provide the procedural tools necessary to accomplish the purposes of the rule. According to the Court, when the trial judge personally addresses the defendant regarding the voluntariness and consequences of his plea and his understanding of the nature of the charge, he exposes the defendant's state of mind on the record.[32] This not only facilitates the district judge's determination of voluntariness, it also eases disposition of subsequent collateral attacks on voluntariness.[33] Thus, the Court concluded that the purposes of the rule are undermined when the district court judge makes assumptions about the defendant's understanding of the charges not based on responses to his inquiries on the record.[34] In order for the district judge to have complied with Rule 11, the Court maintained that he must have inquired whether the defendant understood the nature of the charge.[35] Compliance, according to the Court, demands on the record responses to the judge's inquiries without regard to any inferences of the judge.

Having decided that Rule 11 had not been complied with in this case, the *McCarthy* Court further considered what effect this noncompliance should have. Looking again to the two purposes of the rule, the Court determined that there is no substitute for demonstrating that a plea is informed and voluntary at the time it is entered.[36] In the Court's view, any subsequent attempt to make this determination would be highly subjective,[37] and any attempt to determine if the defendant's plea would otherwise have been different is highly speculative.[38] The Court concluded that "prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea."[39] For these reasons, the *McCarthy* Court

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[31] *Id.* at 465.
[32] *Id.* at 467.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 470.
[37] *Id.* at 469.
[38] *Id.* at 471.
[39] *Id.* at 471-72. The Court continued:

> Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Id. at 472.

held that noncompliance with Rule 11 must result in reversal of the conviction and an opportunity to plead anew.

B. *1975 Amendment to Rule 11*

The decision in *McCarthy* construed the 1966 version of Rule 11. In order to comprehend the problem currently confronting the circuit courts, it is necessary to examine the rule as it now exists as well as the reasons for the extensive changes which were made in 1975. Prior to the 1975 amendment, Rule 11 was very brief. In one sentence the rule set out the requirements that the court address the defendant personally and determine that the plea is informed, voluntary, and made with knowledge of the consequences.[40] As the following explication of the 1975 amendment will indicate, all of Rule 11(c) and (d) is now devoted to the procedures necessary to fulfill these requirements.[41]

Subsection c(1),[42] for example, replaced the vague language of "consequences of the plea" with a requirement that the defendant be informed of the maximum penalty as well as any mandatory minimum. This subsection retained the requirement present in the old rule that the defendant be informed of the nature of the charge. In addition, subsections c(2), (3), and (4) specify

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[40] See text of rule at note 27 *supra*.

[41] FED. R. CRIM. P. 11(c) and (d) provide in full:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

[42] See text of rule at note 41 *supra*.

the constitutional rights that the defendant waives by pleading guilty or nolo contendere. Under these portions of the amended rule, the judge must personally inform the defendant and determine that he understands that he has (1) the right to be represented by an attorney — appointed, if necessary — at each stage of the proceedings,[43] (2) the right to plead not guilty and continue to so plead,[44] (3) the right to trial by jury and assistance of counsel at that trial,[45] (4) the right to confront and cross-examine witnesses against him,[46] and (5) the right not to be forced to incriminate himself.[47] The amended rule then provides that the defendant must be told that if he pleads guilty or nolo contendere, he waives the right to a trial of any kind.[48] The provisions in subsections c(2), (3), and (4) were added to satisfy the mandate of *Boykin v. Alabama*[49] that the defendant be apprised of the rights he is waiving in pleading guilty.[50] The *Boykin* Court held that the defendant was denied due process in an Alabama court when his guilty plea was accepted with no indication on the record that his plea was informed and voluntary. According to the *Boykin* Court, the waivers of constitutional rights to confront one's accusers, to trial by jury, and the privilege against compulsory self-incrimination are inherent in a guilty plea.[51] Thus, waiver of these rights cannot be presumed from a silent record.[52]

While subsections c(1) through c(4) clarified the formerly vague requirements of the rule and of *Boykin*, subsection c(5) added a totally new requirement to the rule. This subsection demands that the defendant be advised that he may be asked questions about the offense to which he is pleading, and that he may be subject to a perjury charge for statements made, under oath, in connection with a plea during the plea proceeding. This subsection was adopted because Congress believed it was only fair to provide such a warning.[53]

In addition to the extensive requirements located in subsection 11(c), subsections (d), (f), and (g) also contain relevant portions of the rule. Like former Rule 11, subsection (d) requires that the judge address the defendant personally and determine that the plea is voluntary. Additionally, subsection (d) specifies that the judge ask whether the plea results from a plea agreement.[54] The requirement, now in 11(f), that the judge determine that there is a factual

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[43] FED. R. CRIM. P. 11(c)(2).
[44] *Id.* 11(c)(3).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* 11(c)(4).
[49] 395 U.S. 238 (1969).
[50] 1975 *Advisory Committee Notes*, *supra* note 4, at 1418; Notes of Committee on the Judiciary, H.R. REP. NO. 247, 94th Cong., 1st Sess. 9 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 679 [hereinafter cited without parallel citation as HOUSE REPORT]
[51] 395 U.S. at 243.
[52] *Id.*
[53] HOUSE REPORT, *supra* note 50, at 679.
[54] See text of rule at note 41 *supra*.

basis for the plea remains unchanged from the old rule.[55] Finally, a requirement was added in 11(g) for a verbatim record of the guilty plea proceeding to be kept.[56]

As a result of the extensive changes to the rule, significant questions have arisen as to whether the judge must comply strictly with every word of the rule's amended version and whether the *per se* reversal rule of *McCarthy* applies to noncompliance with the revised rule. Most of the circuit courts of appeal have considered these questions. The next section will describe the different approaches developed by the circuit courts.

II. Standards of Compliance and Review

The circuit courts have addressed the issue of compliance with the revised rule in a variety of ways. Some courts have adopted a standard which requires strict adherence to Rule 11 and automatic reversal for a failure to comply.[57] This approach and its problems will be illustrated in the following section through a consideration of Second Circuit cases.

Other circuits, believing that Rule 11 is too detailed and complex to mandate automatic reversal for each technical failure to comply with the rule, have chosen less strict standards.[58] Some of these courts have held that as long as there has been "substantial compliance" with Rule 11, the conviction will be affirmed. Where "substantial compliance" has not been achieved, the plea will be vacated.[59] Most of the "substantial compliance" courts, however, have not carefully defined what constitutes substantial compliance with the rule.[60] Fur-

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[55] FED R. CRIM. P. 11(f) provides: "Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

[56] FED. R. CRIM. P. 11(g) provides: "Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea."

[57] See note 23 *supra*.

[58] See note 24 *supra*.

[59] United States v. Lambros, 544 F.2d 962 (8th Cir. 1976); *cf.* United States v. Gray, 611 F.2d 194 (7th Cir. 1979) (As discussed in note 24 *supra*, the opinion in *Gray* implies a "substantial compliance" approach although the Seventh Circuit has not clearly articulated which standard it is adopting.)

[60] The Eighth Circuit, for example, never clearly defined the standard used. It appears that its approach is to require the district court to employ procedures sufficient to determine that the defendant understands the charges and the consequences of the plea and that the plea is truly voluntary. United States v. Cammisano, 599 F.2d 851, 855 (8th Cir. 1979). Ritualistic compliance with Rule 11 is unnecessary, but a plea taken without substantial compliance with the rule will be reversed. *Id.* The line between complying with the substance of a rule and literal requirements of a rule is not always clear. This is best exemplified by United States v. Lambros, 544 F.2d 962 (8th Cir. 1976). In that case, the prosecutor, rather than the judge, explained the nature of the offense and the rights waived and questioned the defendant about the voluntary and informed nature of the plea. *Id.* at 964. Following this, the district judge briefly questioned the defendant. *Id.* The appellate court held that there was substantial compliance with Rule 11

thermore, they often do not distinguish between the question of what constitutes compliance with Rule 11 and the question of what standard of review will be applied in a noncompliance situation. As a result, it is sometimes unclear what the basis is for a court's refusal to vacate a plea — whether it considers Rule 11 to have been complied with by the judge or whether it believes that the judge has not fully complied with the rule but refuses to vacate the plea because it is adopting a harmless error standard and considers the error to be harmless.[61]

One circuit has articulated more clearly the standard of less than strict compliance and automatic reversal. The Fifth Circuit requires automatic reversal only if the core concerns of the pre-*McCarthy* rule are not addressed.[62] In essence, this is a more explicit articulation of a "substantial compliance" rule. The Fifth Circuit will be used to illustrate the "substantial compliance" approach and its problems. The Fifth Circuit cases and the problems in its approach will be described following the discussion of the Second Circuit.

A. *Second Circuit: Strict Compliance and Automatic Reversal*

In *United States v. Journet*,[63] the Second Circuit adopted a strict compliance standard and held that unless the defendant is informed of each element enumerated in Rule 11, the plea must be vacated. The defendant in *Journet* expressly waived his right to a jury trial, his right to confront and cross-examine witnesses against him, and his right to a presumption of innocence.[64] The trial court judge also established the voluntariness of the plea and the factual basis for the plea. Further, he informed the defendant of the minimum and max-

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because the district court by its personal questioning had adopted the record made by the prosecutor. *Id.* at 966. Thus, the court refused to elevate form over substance. By viewing the requirement that the judge address the defendant as purely an issue of form, however, the court ignored the voluntariness issues raised by allowing the prosecutor to function in this role. In United States v. Hart, 566 F.2d 977 (5th Cir. 1978), the Fifth Circuit rejected such a procedure stressing that an atmosphere of subtle coercion is created by allowing the prosecutor to address the defendant. *Id.* at 978.

[61] *See, e.g.*, United States v. Gray, 611 F.2d 194 (7th Cir. 1979); United States v. Lambros, 544 F.2d 962 (8th Cir. 1976). In *Lambros*, the court stated that the defendant pointed "to no way in which he was misled or prejudiced by the Rule 11 proceedings." *Id.* at 965. See note 60 *supra*. It is not clear from this statement whether the court determined that the judge had substantially complied with Rule 11 in accepting and not personally addressing the statements made by the prosecutor or whether there was error in complying with the rule but the court considered the error to be harmless. It is possible that the courts obfuscate the distinction between a standard of substantial compliance and a harmless error standard of review because they believe that *McCarthy* compels automatic reversal as long as there is not substantial compliance with the rule. The *McCarthy* rule, according to this view, would preclude use of a harmless error standard because it does not relate to the degree of compliance with the rule but instead is a standard of review which depends on the real effect of the noncompliance on the defendant. Thus, even though a court considers any prejudice there may be to the defendant, it may not want to indicate that it is using a harmless error standard.

[62] See text and notes at notes 97-99 *infra*.

[63] 544 F.2d 633 (2d Cir. 1976).

[64] *Id.* at 634.

imum sentences.[65] The judge, however, failed to inform the defendant explicitly that the maximum possible penalty included possible life-time parole, and that if he went to trial, he would have the right to assistance of counsel.[66] In addition, the judge did not warn the defendant that (1) by pleading guilty he was waiving his right against self incrimination, (2) there would be no further trial of any kind, and (3) answers to the court, under oath, could be used against him later in a prosecution for perjury.[67]

The *Journet* court held that the guilty plea had to be vacated because of the district court's failure to comply with Rule 11(c).[68] The court found it inadequate to establish that the plea was voluntary and informed in light of all the surrounding circumstances.[69] Instead, the *Journet* court held that the language of Rule 11 must be followed strictly, and that the "district court judge must personally inform the defendant of each and every right and other matter set out in Rule 11. Otherwise the plea must be treated as a nullity."[70] The court reasoned that Congress clearly had mandated such strict adherence in adopting the 1975 amendment to the rule.[71] By using the language "the court *must* address the defendant personally . . ." [emphasis added],[72] the *Journet* court concluded that Congress, in very distinct language, had mandated the procedure to be followed.[73] Furthermore, the court maintained, the legislative history evidences Congress' purpose of codifying the advice required by *Boykin v. Alabama* and demonstrates that the choice of specific language was deliberate.[74] Based on this reasoning, the *Journet* court rejected a harmless error standard,[75] claiming that such a standard would bypass the specific procedure required by Rule 11 and thus would defeat Congress' intent of insuring compliance with *Boykin*.[76]

Two Second Circuit cases decided after *Journet* underscore the problems courts have encountered in adhering to standards of strict compliance once they have been adopted. In *United States v. Michaelson*[77] and *United States v. Saft*,[78] the defendants' guilty pleas were not vacated even though there appeared to be noncompliance with Rule 11.

In *Michaelson*, the defendant was not advised, as demanded by Rule

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[65] *Id.*
[66] *Id.* at 636.
[67] *Id.* at 636-37.
[68] *Id.* at 636.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 635-36.
[72] FED. R. CRIM. P. 11(c).
[73] 544 F.2d at 635.
[74] 544 F.2d at 635-36. For a discussion of how the legislative history demonstrates that the choice of mandatory language was deliberate see text and notes at notes 121-36 *infra*.
[75] For a definition of harmless error, see text of FED. R. CRIM. P 52(a) at note 158 *infra*.
[76] 544 F.2d at 636.
[77] 552 F.2d 472 (2d Cir. 1977).

11(c)(3), that he could not be compelled to incriminate himself.[79] Nevertheless, carving out an exception to its rule of automatic reversal, the *Michaelson* court held that vacating the defendant's guilty plea "would be a needlessly rigid reading of amended Rule 11 and of *Journet*."[80] In evaluating the district court's failure to inform the defendant of his right not to incriminate himself, the court concluded that Michaelson clearly did not plead guilty because he believed that he would be compelled to testify against himself.[81] In considering that the omission was not prejudicial, the court appears to have applied a harmless error standard even though the opinion concluded with the statement that "[o]ur decision therefore is not to be interpreted as overruling *Journet* in any respect."[82]

In *United States v. Saft*, the Second Circuit again refused to reverse a conviction based on a guilty plea. Here, however, the court held that there was compliance with Rule 11[83] even though, on the surface, there was not literal adherence to the entire rule. In *Saft*, the trial court judge failed to inform the defendant, as required by 11(c)(3), that he would have the right to counsel if he went to trial.[84] The circuit court reasoned that even though the defendant was not specifically apprised of his right to counsel if he went to trial, as required by 11(c)(3), it would defy reality and contradict the defendant's own affidavit to say that he did not know his rights.[85] Thus, despite the omission, the court con-

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[78] 558 F.2d 1073 (2d Cir. 1977).

[79] 552 F.2d at 476. Additionally, the defendant was not advised, as required by 11(c)(5), that if he answered questions posed by the court, his statement could later be used against him in a prosecution on a perjury charge. *Id.* The court reasonably concluded that since the district courts in the Second Circuit do not place the defendant under oath during questioning, the failure to give this warning was not reversible error. *Id.* at 477.

[80] *Id.*

[81] *Id.* The Court gave two reasons for reaching this conclusion. First, at the time of sentencing, Michaelson's attorney indicated that the defendant had intended to testify at trial in order to establish his defense of entrapment. *Id.* Second, since the defendant was represented by competent counsel who had already begun to participate in the trial, the court considered it "highly unlikely" that the lawyer would not have advised the defendant of the right not to incriminate himself. *Id.*

[82] *Id.* at 477-78. The court tried to justify its failure to follow the strict reading of Rule 11 dictated in *Journet* by noting that the plea was taken after the trial had started and before the decision in *Journet*. *Id.* at 477.

[83] 558 F.2d at 1079.

[84] *Id.* at 1080. Additionally, the defendant contended that he was not sufficiently informed of the nature of the charge to which he was pleading because the judge did not provide the equivalent of a jury charge. *Id.* at 1079. The court ruled that to comply with the Rule 11(c)(1) requirement that the defendant be informed of the nature of the charge, it is enough for the indictment to be read, for the defendant to indicate that he understands, and for a judge to determine that he understood. *Id.* In the *Saft* court's view, the equivalent of a jury charge is unnecessary where the defendant has read the indictment and conferred with counsel, and where charges are easily understood by a person with the defendant's experience, education and intelligence. *Id.* The court relied on legislative history to support its interpretation. *Id.* at 1079-80. The Advisory Committee Notes indicate that the method for determining the defendant's understanding of the nature of the charge will vary depending on the complexity of the charges and the characteristics of the defendant. 1975 *Advisory Committee Notes*, *supra* note 4, at 1418.

[85] 558 F.2d at 1080.

cluded that there had been compliance with Rule 11.[86] The *Saft* court then was able to distinguish *Journet* by noting that in *Journet*, the district court concededly failed to comply with several elements of the rule.[87]

It is arguable that the *Saft* court in fact applied a harmless error standard, although it claimed to be using the *Journet* standard which rejected harmless error. In considering the posture of the case at the time of the plea and the reality that the defendant probably knew his rights, the court deviated from a standard based strictly on the requirements of the rule. In its place, the *Saft* court established a rule that determines from external circumstances whether the violation of the rule is prejudicial.

The *Michaelson* and *Saft* decisions typify the problems that courts have had to address after adopting a standard of strict compliance and automatic reversal for noncompliance with Rule 11.[88] These courts reason that the legislative history,[89] the language of the rule,[90] the *McCarthy*[91] and *Boykin*[92] decisions, and principles of consistency demand a rule of strict compliance.[93] Nevertheless, they find it particularly difficult to justify reversal of a conviction in a fact situation where the judge has conscientiously reviewed all of the elements required by Rule 11, save one, and where that one omission obviously had no impact on the defendant's decision to plead guilty.[94] As illustrated by *Michaelson* and *Saft*, in such situations the courts use various mechanisms to justify their failure to vacate the plea while still advocating a strict compliance standard. These methods include carving out exceptions to the rule of automatic reversal for noncompliance[95] as well as construing situations where there was not literal compliance to be in compliance with the rule.[96]

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[86] *Id.* at 1079-81.

[87] *Id.* at 1081. Additionally, the court noted that as in *Michaelson*, the plea was taken before the *Journet* court construed the rule. *Id.*

[88] In United States v. Alejandro, 569 F.2d 1200 (2d Cir. 1978), the court vacated a plea because the judge failed to inform the defendant of the maximum special parole term that could be imposed. The court found none of the distinguishing circumstances here which were found to be controlling in *Saft* and *Michaelson*. *Id.* at 1202.

[89] United States v. Journet, 544 F.2d 633, 635-36 (2d Cir. 1976).

[90] *Id.* at 635; United States v. Del Prete, 567 F.2d 928, 929-30 (9th Cir. 1978).

[91] United States v. Del Prete, 567 F.2d 928, 929 (9th Cir. 1978); United States v. Journet, 544 F.2d 633, 635 (2d Cir. 1976); United States v. Boone, 543 F.2d 1090, 1092 (4th Cir. 1976).

[92] United States v. Journet, 544 F.2d 633, 636 (2d Cir. 1976).

[93] In United States v. Carter, 619 F.2d 293 (3d Cir. 1980), the Third Circuit used all the rationales mentioned in the text at notes 89-93 *supra* in order to mandate strict compliance with Rule 11, but stopped short of establishing a rule of automatic reversal for technical noncompliance. The court threatened to adopt such a rule in the future, if necessary. *Id.* at 299. Under the facts of the case, the plea had to be vacated even under a harmless error standard. *Id.* at 299-300.

[94] United States v. Hamilton, 568 F.2d 1302, 1307 (9th Cir.), *cert. denied*, 436 U.S. 944 (1978); United States v. Michaelson, 552 F.2d 472, 477 (2d Cir. 1977).

[95] See text and notes at notes 79-81 *supra*.

[96] See text and notes at notes 83-87 *supra*; *See also* United States v. Hamilton, 568 F.2d 1302 (9th Cir. 1978).

As will be shown in the following section, some courts have rejected the rule of strict compliance and automatic reversal for noncompliance. Rather than adopting a strict rule and carving out exceptions, these courts have attempted to define a standard that would not mandate reversal for technical failures to comply with Rule 11. The next section will describe the standard adopted in one of these courts and the difficulties inherent in this standard.

B. *Fifth Circuit: Substantial Compliance*

In *United States v. Dayton*,[97] an *en banc* decision, the Fifth Circuit held that a distinction should be made between the core requirements of the pre-*McCarthy* rule — that the plea be voluntary, informed, and made with knowledge of the consequences — and the 1975 additions to the rule.[98] Initially focusing on the core requirements, the *Dayton* court held that a total failure to address any one of the three concerns should trigger the automatic reversal standard set forth in *McCarthy*.[99] The court specified, however, that when the three core concerns are *inadequately addressed*, rather than totally omitted, the harmless beyond a reasonable doubt standard of *Chapman v. California*[100] should be applied to determine whether the alleged deficiency merits reversal.[101]

Having described the two possible standards which could apply to *McCarthy*'s core concerns, the *Dayton* court next addressed what level of review should be applied to the post-*McCarthy* additions to Rule 11. When a violation involves the post-*McCarthy* additions to the rule, rather than the core concerns, the court ruled that *per se* reversal was not mandated.[102] Rather, in such an instance, the reviewing court should regard the judge's acceptance of the guilty plea as a positive finding of fact on each of these Rule 11 matters. These findings should be reviewed under the clearly erroneous rule[103] and a harmless error

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[97] 604 F.2d 931 (5th Cir. 1979).

[98] *Id.* at 939. In *Dayton*, the defendant alleged two bases for setting aside his plea. *Id.* at 941. He claimed first that he was not sufficiently informed of the nature of the charges against him and, second, that there was not a sufficient determination by the trial judge that a factual basis for the plea existed. *Id.* During the guilty plea proceeding, the trial judge read the charges contained in the two counts to which Dayton was pleading guilty. *Id.* In response to the judge's questions, Dayton said that he understood the charges and had no questions. *Id.* Later the judge asked the prosecuting attorney to state the facts that the government contended could be proven. *Id.* at 942. Following the prosecutor's recitation of the facts, Dayton admitted that these facts were true and could be admitted beyond a reasonable doubt. *Id.*

[99] *Id.* at 939.

[100] 386 U.S. 18 (1967). *Chapman* held that there may be some constitutional errors which do not demand automatic reversal of a conviction because, in the context of the case, the error is so insignificant as to be deemed harmless. *Id.* at 22. The Court held that in order for a constitutional error to be considered harmless, it must be determined by the court to be harmless beyond a reasonable doubt. *Id.* at 24. According to the *Chapman* Court, to meet this standard, the prosecution must prove beyond a reasonable doubt that the alleged error did not contribute to the verdict. *Id.*

[101] 604 F.2d at 939.

[102] *Id.* at 940.

[103] According to the *Dayton* court, factfindings by judges in criminal cases are addressed in FED. R. CRIM. P. 23(c). *Id.* at 940 n.14. This rule does not indicate the proper standard to be

standard.[104] The *Dayton* court reasoned that in view of the current complexity of Rule 11, vacating a plea for a technical noncompliance that has no impact on the voluntary and informed nature of the plea is contrary to the finality needed in the plea procedure.[105] The court further noted that to require automatic reversal for errors in the handling of post-*McCarthy* additions to the rule would be to put these requirements on a higher plane than that accorded some constitutional rights.[106] Thus, the *Dayton* court adopted a three-tiered standard which demands automatic reversal for failure to address the core concerns, possible use of the *Chapman* standard for inadequate address of these concerns, and a clearly erroneous and harmless error standard for errors involving post-*McCarthy* additions to the rule.[107]

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used for reviewing these findings of fact. Yet, according to the court, it is generally agreed "that the 'clearly erroneous' test should be applied" to judge's findings in jury-waived criminal proceedings. *Id.* quoting 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 374, at 18 (1969). This test has the same meaning as it has in a civil case. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 374, at 18 (1969). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 363, 395 (1948).

[104] 604 F.2d at 940-41. The standard which federal courts use to determine if an error, not of constitutional dimension, is harmless is whether

> the conviction is sure that the error did not influence the jury, or had but very slight effect . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). Although the "harmless error" statute construed in *Kotteakos* has been replaced, this view remains authoritative. *See* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 854 at 354-55 (1969 & Supp. 1980); United States v. Ruffin, 575 F.2d 346, 358-59 (2d Cir. 1978).

[105] 604 F.2d at 939-40. The court found support for its distinction between technical noncompliance with Rule 11 and involuntary pleas in Halliday v. United States. *Id.* at 940 *citing* Halliday v. United States, 394 U.S. 831, 833 (1969). In *Halliday*, the Supreme Court refused to apply retroactively the *McCarthy* automatic reversal rule. 394 U.S. at 833.

[106] 604 F.2d at 939. In Chapman v. California, 386 U.S. 18 (1967), the Court held that constitutional error could be harmless. Although a different result was required by the facts in *Chapman*, the Court indicated that comment on a defendant's failure to testify could constitute harmless error even though it was a violation of the constitutional privilege against self-incrimination. *Id.* at 24-26. *See* Coleman v. Alabama, 399 U.S. 1, 10-11 (1970), in which the Court remanded the case to the state court to determine if the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California.*

[107] The holding in *Dayton* is particularly interesting because the result in the case did not demand adoption of this standard. The defendant claimed that he was not sufficiently informed of the nature of the charges. *Id.* at 941. After the indictment was read to Dayton, he was asked if he understood it and if he had any questions. *Id.* the court found that in this case, the reading of the indictment with the opportunity for questioning was sufficient explanation of the nature of the charge. *Id.* at 943. There appears to have been full compliance with the language of Rule 11 in this proceeding. The result in this case could have been reached by simply overruling the court's precedents which had demanded more than routine questions and solitary responses. *See, e.g.*, United States v. Lincecum, 568 F.2d 1229 (5th Cir. 1978); Sierra v. Government of Canal

The three-tiered standard announced in *Dayton* has been applied in several later Fifth Circuit cases. In *United States v. Caston*,[108] the defendant was not explicitly informed of his rights to have a jury trial, to be assisted by counsel, and not to incriminate himself at trial as required by Rule 11(c)(3). He was also not informed that his answers could later be used in a perjury prosecution against him as demanded by Rule 11(c)(5).[109] The court held that in spite of the district court's failure to comply fully with Rule 11, the plea would not be vacated.[110] In reaching this conclusion, the court found that the three core considerations of the pre-*McCarthy* rule had been addressed, since, in asking the accused if he understood that he was waiving all of his constitutional protections, the trial judge had sufficiently determined that Caston understood the consequences of the plea.[111] Because the judge had determined that the defendant understood the waiver and the defendant did not allege that he was prejudiced by the judge's inadequate compliance with Rule 11(c)(3), the court concluded that the error was harmless beyond a reasonable doubt and did not merit reversal.[112] The court also determined that the Rule 11(c)(5) omission did not merit reversal because the protection provided by this subsection goes to the fairness of a subsequent perjury conviction rather than the voluntariness of the plea.[113] Since the advice required by 11(c)(5) is not one of the core inquiries under Rule 11 and the error was not prejudicial because there was no prosecution for perjury, the *Caston* court determined that reversal was not warranted under the harmless error standard which applies to violations of post-*McCarthy* additions to the rule.[114]

In *United States v. Almaguer*,[115] a different Fifth Circuit panel had difficulty in applying the *Dayton* standard. Initially, the *Almaguer* court vacated the defendant's plea, holding that the failure of the trial court to inform the defendant that his answers could be used later in a perjury prosecution against him, as required by 11(c)(5), was reversible error.[116] In this opinion, the court, acknowledging a contrary decision in *Caston*, reasoned that it could not consider the error harmless in view of all of the facts and the failure of the trial court to address any part of Rule 11(c)(5).[117] On rehearing, the same panel

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Zone, 546 F.2d 77 (5th Cir. 1977).

[108] 615 F.2d 1111 (5th Cir. 1980).

[109] *Id.* at 1113-14.

[110] *Id.* at 1116.

[111] *Id.* at 1115.

[112] *Id.* at 1115-16.

[113] *Id.* at 1116.

[114] *Id.* In United States v. Law, 633 F.2d 1156 (5th Cir. 1981), the Fifth Circuit used the same analysis. The court maintained that it was applying the "harmless error" standard of review to the court's failure to give a Rule 11(c)(5) instruction and the "harmless beyond a reasonable doubt" standard to the omission of a specific inquiry about provisions made outside the plea bargain. *Id.* at 1157-58.

[115] 620 F.2d 557 (5th Cir. 1980) *recalled and vacated* in 632 F.2d 1265 (5th Cir. 1980).

[116] 620 F.2d at 559.

[117] *Id.* The court recognized that under *Dayton* it could regard the trial court's acceptance of the plea as a positive finding on the requirement of Rule 11(c)(5), reviewable under a clearly

recalled and vacated the first opinion and held that the 11(c)(5) violation was not reversible error.[118] The court noted that because the warning in 11(c)(5) was not one of the core inquiries, automatic reversal was not mandated.[119] Since Almaguer was not being prosecuted for perjury and he had not alleged prejudice, the court determined that the error was harmless under the standard of *Chapman v. California* and refused to vacate the plea.[120] The *Almaguer* court did not explain the use of the *Chapman* constitutional standard in place of the general "harmless error" standard suggested by *Dayton* for these types of errors and used in *Caston*. These attempts to apply the *Dayton* standard demonstrate the courts' difficulty in properly applying the standards and in reaching consistent results.

As the decisions in *Almaguer* and *Caston* make clear, the *Dayton* standard creates a very cumbersome analysis, is difficult to apply, and invites inconsistent results. In addition, a determination of harmlessness necessary to a harmless error standard is somewhat speculative in the context of a guilty plea. These difficulties, as well as those suggested in the discussion of strict compliance, will be discussed in the following section. They demonstrate the inadequacies of the solutions articulated thus far by the courts.

III. ANALYSIS

The approaches adopted by all of the circuits, in attempting to develop and adhere to standards for compliance with Rule 11, have had a variety of shortcomings. In order to determine what criteria are essential to a correct standard, this section will analyze the statutory language, legislative intent, and purposes of the rule as well as the conflicting policy concerns involved. Next, this section will apply these principles to the approaches utilized by the Second and Fifth Circuits, in order to demonstrate the strengths and weaknesses of each approach.

A. *Rule 11: Language, Legislative History, and Policy*

A reading of Rule 11 indicates that it uses clearly mandatory language. Subsection (c) provides "[t]he court *must* address the defendant personally in open court and inform him of, and determine that he understands . . . ." [emphasis added][121] The language could hardly be more definitive. Furthermore, the wording was changed from the less definitive language in the Advisory Committee version which provided: "The court shall not accept a plea

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erroneous standard. *Id.* The circuit court panel addressed this by saying that in view of the district court's failure to address Rule 11(c)(5), a finding that the defendant understood Rule 11(c)(5) would be a finding by implication which would be clearly erroneous. *Id.*

[118] United States v. Almaguer, 632 F.2d 1265, 1266-67 (5th Cir. 1980).

[119] *Id.* at 1266 *citing* United States v. Caston, 615 F.2d 1111, 1116 (5th Cir. 1980).

[120] 632 F.2d at 1267.

[121] FED. R. CRIM. P. 11(c).

of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands . . . ."[122] This strengthening of the language of the rule in its final version supports the view that the use of mandatory language in the rule was intentional. The mandatory language combined with the decision to expand the rule extensively rather than leave the choice of warnings to the trial judge[123] indicate that the 1975 amendments were intended to impose absolute requirements on the district courts and not merely to furnish direction.[124] Thus, one essential element of any standard adopted must be that it requires the rule to be followed closely.

The view that strict compliance is mandated by the rule is further supported by the legislative intent behind the amendments to Rule 11. Rule 11 was amended in 1975 in order to identify, with greater specificity, what must be explained to the defendant regarding the nature of the charge and the consequences of the plea.[125] The amendments also served to codify the requirements of *Boykin v. Alabama* regarding the constitutional rights which are waived by a guilty plea.[126] Initially, in amending Rule 11, the Advisory Committee had considered some of the advice later included in Rule 11(c) to be optional and suggested that the determination of what warnings are constitutionally required should be left to the development of case-law.[127] Their approach, however, was rejected in favor of mandatory language. The House Judiciary Committee expanded and changed the language suggested by the Advisory Committee to include the current Rule 11(c)(2) and (3)[128] because it concluded that the warnings given to the defendant ought to include those that *Boykin* mandated as constitutionally required.[129] This expansion reflects Congress'

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[122] HOUSE REPORT, *supra* note 50, at 691, 693.

[123] All of Rule 11(c) and (d) (over 300 words) are devoted to requirements which were disposed of in one sentence in the previous version of the rule. See text and notes at notes 40-54 *supra*.

[124] The "clearly erroneous" and "harmless error" standards adopted by *Dayton* for violations of post-*McCarthy* additions to the rule give a great deal of flexibility to the courts. These standards imply that the 1975 additions were made simply to furnish direction to the courts. It thus appears to be contrary to the language of the statute.

[125] 1975 *Advisory Committee Notes*, *supra* note 4, at 1418; *See also* Conference Committee Notes, H.R. REP. NO. 414, 94th Cong., 1st Sess. (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 714.

[126] 1975 *Advisory Committee Notes*, *supra* note 4, at 1418.

[127] 1975 *Advisory Committee Notes*, *supra* note 4, at 1418-19.

> In explaining to a defendant that he waives his right to trial, the judge may want to explain some of the aspects of trial such as the right to confront witnesses, to subpoena witnesses, to testify in his own behalf, or, if he chooses, not to testify. What is required, in this respect, to conform to *Boykin* is left to future case-law development.

Id.

[128] See text of rule at note 41 *supra*.

[129] HOUSE REPORT, *supra* note 50, at 679. Unlike the approach suggested by the Advisory Committee, see note 127, *supra*, Congress chose not to leave to future case law development the question of what protections were required. Instead, Congress added these sections to the rule.

belief that the particular warnings in these sections are required by *Boykin*, and suggests that the explicit list in the rule must be followed.

The addition of Rule 11(c)(5)[130] to the 1975 amendment also supports the notion that Congress intended that its requirements be closely followed. The House Judiciary Committee added the warning that if the defendant answers questions under oath, on the record, and in the presence of counsel, his answers may be used against him in a later perjury trial.[131] The Committee added this provision to the rule, as amended by the Court, as a result of the change it made to 11(e)(6)[132] to permit the use of the statements made in a plea proceeding in a prosecution for perjury or false statement.[133] The Committee recognized that the subsequent use of the statements made during plea proceedings might discourage defendants from being completely candid during plea negotiations and might hamper some plea agreements.[134] Because the potential prosecution could be a factor in a defendant's decision with respect to his plea, the Committee felt that it was only fair to give the warning contained in 11(c)(5).[135] The recognition that justice required this warning since it could significantly affect the defendant's plea decision indicates that the Committee considered the requirement to be mandatory.

In short, both the language of the rule and the congressional intent behind the specific amendments indicate that close adherence to Rule 11 is required. This requirement can also be inferred from Congress' decision to revise Rule 11 without adding any qualifiers, even though it was aware that *McCarthy* had required strict compliance with Rule 11.[136] Thus, strict adherence to the procedures in Rule 11 is an essential element of a proper standard of compliance with the rule. What must be determined now is the effect of noncompliance with the rule.

There is some support in a recent Supreme Court case for the view that *per se* reversal of a conviction is required for even a technical violation of Rule 11. In *United States v. Timmreck*,[137] the Court held that a conviction based on a guilty plea is not subject to collateral attack when all that is shown is a failure to

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[130] See text of rule at note 41, *supra*.

[131] HOUSE REPORT, *supra* note 50, at 691, 693.

[132] The relevant portion of Fed. R. Crim. P. 11(e)(6) which was then in effect provided:

> However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Rule 11(e)(6) was amended effective December 1, 1980, but the language did not materially change with respect to this issue. *See* 18 U.S.C. app. 1664-65 (Supp. III 1979).

[133] HOUSE REPORT, *supra* note 50, at 679.

[134] *Id.*

[135] *Id.*

[136] In view of this, the *Dayton* distinction between the core concerns of the pre-*McCarthy* rule and the post-*McCarthy* additions appears to be contrary to legislative intent. Considering the clarity of the *McCarthy* holding, if the applicability of *McCarthy* were intended to differ for different portions of the rule, a distinction could have been made by Congress when amending the rule.

[137] 441 U.S. 780 (1979).

comply with the formal requirements of Rule 11.[138] Some of the language in *Timmreck*[139] hints that a strictly technical violation would demand reversal on direct appeal. This language is not dispositive, however.[140]

A number of policy considerations also strongly support automatic reversal for a failure to comply strictly with Rule 11. Both Congress and the courts have been concerned with insuring that defendants' rights are consistently safeguarded while preserving the finality of the plea procedure. A rule of strict compliance and *per se* reversal best balances these conflicting concerns. Such a rule insures that a defendant's rights are protected in a uniform manner in all of the courts and encourages district court judges to adhere consistently to the rule. Vague standards of compliance do not adequately insure that defendants' rights are safeguarded routinely because these standards contribute to results which differ not on the basis of the merits of the case but on the particular panel or court considering the issue.[141] In addition, as clearly articulated in *McCarthy*, strict adherence to Rule 11 creates a record that will more easily defeat a later collateral attack on voluntariness, and thus preserve the finality of the plea procedure.[142]

It is true, of course, that the benefits of a strict rule of compliance and automatic reversal must be balanced against the burdens such a rule places on the judicial system. The burdens which result from strict compliance and automatic reversal, however, are relatively slight as long as the standard is not unequivocally literal. One burden that must be considered in a discussion of reversing criminal convictions is the potential for freeing numerous factually guilty defendants. Yet, it would be extraordinarily rare for reversal for noncompliance with Rule 11 to result in freeing a defendant since, following reversal, each case would be remanded for a new plea. On direct appeal, little time would have elapsed[143] so that evidence or witnesses necessary to a conviction would still be available if the defendant were to enter a new plea of not guilty and a trial were held. Nonetheless, there would be situations where the original plea took place halfway through the defendant's trial or during a trial for several co-defendants which has subsequently been completed. In these cases,

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[138] *Id.* at 785.

[139] "His only claim is of a technical violation of the rule. That claim could have been raised on direct appeal [citation omitted] but was not."
Id. at 784.

[140] A contrary reading is also possible. *McCarthy* held that a Rule 11 error is inherently prejudicial. The failure to reverse the conviction in *Timmreck* may be viewed as deciding that a technical violation of the rule is not prejudicial. *Timmreck* may therefore be viewed as a weakening of the *McCarthy* position.

[141] See text and notes at notes 150-51 *infra*.

[142] 394 U.S. at 467. See text and notes at 31-33 *supra*.

[143] Notice of appeal in a criminal case must be filed within 10 days of the entry of judgment. This time limit may be extended by 30 days on a showing of excusable neglect. FED. R. APP. P. 4(b). A defendant may also make a motion to withdraw a plea of guilty. FED. R. CRIM. P. 32(d). This motion must normally be made before sentencing. Only in order to correct manifest injustice may withdrawal be allowed after sentencing. FED. R. CRIM. P. 32(d).

the government's additional burden would be the costs of duplicate trials and the associated difficulties in obtaining evidence and witnesses. Thus, the burden created by a *per se* reversal rule is the additional cost to the government that will result from repeated plea negotiations, plea proceedings, and trials rather than the more substantial burden of freeing massive numbers of defendants on technical grounds.[144]

Another burden to be considered is that by requiring a judge to follow the rule closely or be in error, a strict standard may initially create the potential for many frivolous appeals. Any increase in such appeals which might be encouraged at first by a strict rule of compliance, however, should diminish with time. The increase in district court compliance which should inevitably result will eventually reduce the number of appeals on these grounds. Furthermore, increased compliance with the rule will reduce the number of and simplify many of the remaining collateral attacks on voluntariness. This would suggest that the long term effect would be to diminish the burden on the judicial system.

A final burden which must be confronted in evaluating a rule of strict compliance and automatic reversal is the impact that unwavering literal compliance has on the integrity of the judicial system. In those few courts which do not comply totally with the rule, there may be occasional instances where reversal is mandated by a literal rule but which produces such absurd results that the entire process appears extreme. A standard to be applied by the courts should thus avoid, to the extent possible, results which are removed from reality and which create questions about the validity of courts' decisions.

An ideal standard would incorporate all of the characteristics discussed above. The language of the rule, the legislative intent in the 1975 amendments, *McCarthy*, *Timmreck*, and policy considerations all suggest strict adherence to the rule and automatic reversal for noncompliance. The standard must, however, attempt to avoid unreasonable results following from technical omissions in order to avoid a loss of credibility for the courts.

B. *Second and Fifth Circuit Approaches Evaluated*

Having identified the necessary components of a proper standard, this section will use these factors to evaluate the approaches used by the Second and

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[144] An issue has been raised as to whether the government may prosecute on the original charges after a defendant succeeds in obtaining reversal of a guilty plea. All of the courts which have considered the issue have determined that the bar against double jeopardy does not prevent the government from prosecuting on the original charges after a defendant has succeeded in setting aside a guilty plea to a lesser included offense. *See* Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 1506 (5th ed. 1980) and Fall 1980 Supp. 93 [hereinafter cited as KAMISAR AND LAFAVE]. *See, e.g.*, Hawk v. Berkemer, 610 F. 2d 445 (6th Cir. 1979); United States v. Williams, 534, F.2d 119 (8th Cir. 1976); United States v. Anderson, 514 F.2d 583 (7th Cir. 1975); Commonwealth v. Therrien, 359 Mass. 500, 269 N.E. 2d 687 (1971). In People v. McMiller, 389 Mich. 425, 208 N.W.2d 451 (1973), however, the court decided "that upon the acceptance of a plea of guilty, *as a matter of policy*, the state may not thereafter charge a higher of-

Fifth Circuits. Initially, it is evident that the Second Circuit articulated a standard of strict compliance and *per se* reversal for noncompliance which correctly embraces the language and intent of Rule 11, the dictates of *McCarthy* and *Boykin*, and significant policy considerations.[145] This circuit, however, has been confronted with particular fact situations in which it was difficult to adhere to this standard as articulated. Rather than changing its standard, the Second Circuit has chosen to carve out exceptions and to adjust its definition of compliance on a case-by-case basis in order to achieve desired results.[146] The court definitively rejected a harmless error standard in *Journet*, yet arguably used such a standard in *Michaelson*[147] and *Saft*[148] because it was difficult to justify reversal when the error had no impact on the defendant's decision to plead guilty and the judge had reviewed all of the other elements of Rule 11.

Thus the Second Circuit adopted a rule which articulated an appropriate standard in light of the rule, the legislative intent, and the Supreme Court decisions. The court did not, however, weave into its standard a rule of reason which would enable it to decide cases on a consistent and principled basis. Instead, in order to arrive at reasonable decisions, it chose to make decisions on a case-by-case basis.

In an attempt to establish a standard which would not demand automatic reversal in cases of technical noncompliance with the rule, other circuits adopted standards of substantial compliance. It is apparent, however, that these standards conflict with the language of the current rule, the legislative intent behind the amendments to Rule 11, and the dictates of *McCarthy*, all of which suggest a rule of strict compliance and automatic reversal. Furthermore, the ambiguity of these standards creates important practical problems. For example, in order to apply the three-tiered standard of *Dayton*, it is first necessary to distinguish between pre-*McCarthy* core concerns and post-*McCarthy* additions to the rule. This determination, in itself, is ambiguous since arguably all of the post-*McCarthy* additions relate to the issues of voluntariness, informed plea, or the consequences of the plea, all of which were the concerns of the pre-*McCarthy* rule. Additionally, it is not clear at what point a failure to address one element of one subsection becomes a "failure" to address one of the core concerns and when it is an "inadequate" address of the core concerns. Assuming the element of the rule can be characterized, the appropriate standard is then applied to determine the effect of noncompliance. While the court suggests three different standards for the three categories,[149] it fails to describe how these standards would operate. The *Dayton* standard is therefore very ambiguous and cumbersome to apply.

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fense arising out of the same transaction." [emphasis added] *Id.* at 434, 208 N.W.2d at 454.

[145] See text and notes at notes 69-76 *supra*. *See also* United States v. Journet, 544 F.2d 633 (2d Cir. 1976).

[146] See text and notes at notes 94-96 *supra*.

[147] See text and notes at note 82 *supra*.

[148] See text following note 87 *supra*.

[149] These standards are: automatic reversal for failure to address the pre-*McCarthy* core

The vagueness of the Fifth Circuit standard, like that of other substantial compliance standards, lends itself to inconsistent application since it can be interpreted differently by different courts.[150] In addition, the determinations under substantial compliance standards rely on factual, subjective, case-by-case determinations which create the opportunity for nonuniform results.[151] It is significant that the *per se* reversal rule of *McCarthy* was created in order to obviate the need for similar subjective determinations. The *McCarthy* Court noted that there is not a good substitute for demonstrating on the record when the defendant enters the plea that the requirements of the rule are met.[152]

Another difficulty inherent in the *Dayton* standard is the speculative nature of a harmless error standard in the context of a guilty plea. For example, the *Caston* and *Almaguer* courts concluded that the failure to inform the defendants of the potential for perjury prosecution was harmless since they were not being prosecuted for perjury. Nevertheless, merely because a defendant has not been charged with perjury by the time that he attempts to vacate his plea does not mean that he could not be charged at some time in the future.[153] In addition, the defendant's lack of information may have influenced his decision to plead guilty. It is impossible to assess with accuracy the considerations which influence a defendant in his determination to enter a guilty plea. Certainly, it is tenuous to hinge reversal on a defendant's allegation that he would not have pleaded guilty had he known that he would be questioned or that his answers could be used in a perjury prosecution. As the Court noted in *McCarthy*, any attempt to determine if a defendant's plea would otherwise have been different is

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concerns; possible use of the *Chapman* standard for inadequate addresses of these concerns; clearly erroneous and harmless error standards for district court's acceptance of plea following a violation of a post-*McCarthy* addition to the rule. See text and notes at notes 97-107 *supra*.

[150] The experience in Illinois is indicative of the difficulties of a substantial compliance approach. Note, *Pleading Guilty: Illinois Supreme Court Rule 402 and the New Federal Rule of Criminal Procedure 11*, 1975 U. OF ILL. L. F. 116, 131 [hereinafter cited as Note, *Pleading Guilty*]. Illinois Rule 402 is comparable to Fed. Rule 11. Supreme Court Rules, ILL. ANN. STAT. ch. 110A § 402 (1976). The language of the rule specifies that substantial compliance is required. The vagueness of the standard has resulted in inconsistent decisions. Note, *Pleading Guilty* at 131. Some of the Illinois courts have interpreted substantial compliance to allow total noncompliance with one provision while other courts require at least partial compliance with every provision. *Id.* at 131-32.

[151] On rehearing, the Fifth Circuit has remedied the inconsistencies between its original decision in *Almaguer* and its decision in *Caston*. See text and notes at notes 115-20 *supra*. The problems that led to the original conflicting results, however, have not been remedied. Certainly, the *Almaguer* opinions are not illuminating as to the reasons for the original conflicting results, the reasons for the change, or the situations which might justify reversal.

[152] 394 U.S. at 469-70.

[153] In *United States v. Timmreck*, the Court held that a conviction based on a guilty plea is not subject to collateral attack when the only violation that is shown is a failure to comply with the formal requirements of Rule 11. 441 U.S. 780, 784-85 (1979). Under this holding, if a defendant were prosecuted for perjury after he could no longer directly appeal an 11(c)(5) violation, this omission would clearly not have been harmless, yet the defendant may have no means of obtaining relief. It has been suggested that if the government later attempts to prosecute a defendant for perjury, he would be entitled to assert the failure to warn as a bar to prosecution. *See* United States v. Conrad, 598 F.2d 506, 509 n.1 (9th Cir. 1979).

highly speculative.[154] Moreover, the *Dayton* court seemed to adopt the "harmless error" standard and the *Chapman* "harmless beyond a reasonable doubt" standard for different violations. It did not, however, distinguish how these would be applied in the context of a guilty plea. In fact, it appears that although the *Caston* court seemed to distinguish the standards, the *Almaguer* court seemed to use them interchangeably. As a result, the standards to be used and their intended application remains unclear.

Finally, not only will the *Dayton* standard be interpreted inconsistently, but it will fail to serve as a deterrent to lax application of Rule 11 in the district courts. In this area, the courts have a unique ability to effect change since they are directly monitoring the compliance of the lower courts.[155] A vague standard will not encourage compliance and will probably result in a decrease in compliance and a resulting increase in direct appeals and collateral attacks on voluntariness.

In summary, it is apparent that the strict compliance, automatic reversal standard conforms to the dictates of *McCarthy*, the intent of the amendments, and the policies which will insure proper application of the rule. Nevertheless, the standard itself provides no mechanism for differentiating any of the unique technical errors which can occur in a guilty plea proceeding. As a result, courts have made exceptions on a case-by-case basis. In an effort to avoid reversal of convictions in cases of technical error, other courts have adopted substantial compliance standards. These courts, however, have created ambiguous standards which fail to adhere to *McCarthy* or the intent and policies behind the rule. Some resolution of the problem presented by the 1975 amendments is necessary. There are a variety of potential solutions that can be adopted. One alternative is the approach suggested in the draft amendment to Rule 11 which has been proposed by the Advisory Committee on Criminal Rules.[156] As will be demonstrated in the following section, this approach has several shortcomings. In the final section of this article, an alternative standard will be presented which contains all of the elements suggested above as critical to an optimal approach. This standard can be used presently by the courts and also can be adopted as an amendment to Rule 11.

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[154] 394 U.S. at 471.

[155] This can be distinguished from the attempts the courts have made using the exclusionary rule to deter police activity that violates the fourth amendment. It has been suggested that the exclusionary rule is not an effective mechanism to deter illegal police conduct because the exclusion of evidence usually has no direct impact on the officer involved. *See* Stone v. Powell, 428 U.S. 465, 498-500 (1976) (Burger, J., concurring); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415-18 (1971) (Burger, J., dissenting). In the context of compliance with Rule 11, the appellate courts are in an optimal position to affect conduct. The impact on district court judges of reversal for failure to comply with the rule would be direct and effective.

[156] *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States* [hereinafter cited as *Proposed Amendments*], November 1, 1979.

IV. DRAFT AMENDMENT TO RULE 11

One attempt to address the problem presented by the 1975 amendments has been made by the Advisory Committee on Criminal Rules. This Committee has drafted a number of changes to Rule 11, including the addition of subsection 11(h).[157]

> (h) HARMLESS ERROR. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

This subsection tries to address the problem that has confronted the courts by applying the Rule 52(a)[158] harmless error standard to Rule 11.

The Advisory Committee Notes accompanying the proposed draft explain the reasons for recommending adoption of subsection (h). The Committee contends that the *McCarthy per se* reversal standard is not appropriate to the current version of the rule.[159] They point out that *McCarthy* dealt with the simple, shorter pre-1975 version of the rule and since the rule has been significantly expanded, the chances of a truly harmless error are much greater in the current version.[160] Furthermore, the Committee reasons that the extensiveness of the current procedure underlines the solemnity of the act of pleading guilty and a plea should therefore not be overturned for a mere technical violation of the rule.[161]

Next, the Committee contends that the Court in *McCarthy* was primarily concerned with cases on collateral attack. Since in *Timmreck* the Court held that collateral relief is not available for technical violations of Rule 11, the Committee determined that the reasoning underlying *McCarthy* is weakened.[162] Finally, the Committee points out that the interest in finality has special force with respect to convictions based on guilty pleas.[163] Liberal rules allowing guilty pleas to be vacated have a significant impact on the integrity of the judicial procedures because the great majority of convictions result from guilty pleas.[164] According to this view, only rarely does a petition to set aside a guilty plea raise the concern that an innocent defendant may have been convicted as a result of

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[157] *Id.* at 4-5. Other proposed changes to Rule 11 include (1) addition of the option to make conditional pleas (11(a)(2)); (2) specific mention of special parole term as part of the maximum possible penalty notification in 11(c)(1); (3) clarification of the wording in 11(c)(4); and (4) changes in the wording of 11(c)(5) which clarify that the warning is only required if the defendant is questioned under oath. *Id.*

[158] FED. R. CRIM. P. 52(a) provides: "HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This standard was established by Congress in 28 U.S.C. § 2111 (1976).

[159] *See Proposed Amendments, supra* note 156, at 20.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 20-21.

[163] *Id.* at 19-20 *quoting* United States v. Timmreck, 441 U.S. 780, 784 (1979).

[164] *Id.*

unfair procedures.[165] Thus, the Committee concluded that though the interest in finality is not as great in a direct appeal as in a collateral attack, it is sufficient to require a harmless error standard.[166]

None of these rationales for the harmless error rule are entirely convincing. With respect to the first proffered rationale, simply because the current rule is explicit and detailed, it would seem to be easier for a judge to comply fully with this rule than with the pre-amendment rule.[167] Certainly, the lack of specificity in the earlier rule led to repeated errors, many of which were harmless. It was the question of how to handle these errors which was the subject of the decision in *McCarthy* and the vagueness of the old rule which led to the expansion of the rule giving less flexibility to the courts. Thus, there appears to be little, if any, justification for claiming that the chance of harmless error is greater under the 1975 amendments. There is also no reason to believe that the extensiveness of the post-1975 procedure increases the solemnity of the act of pleading guilty. The view of a plea as a grave and solemn act undoubtedly was as strong when *McCarthy* was decided as it is today. Moreover, it is the consequences of a guilty plea which make the proceeding a solemn occasion. It is therefore more reasonable to view the solemnity of the act as weighing in favor of vacating pleas for all errors in procedure.

The Committee's further claim that *McCarthy*'s reasoning has been weakened by *Timmreck* suggests that the Committee misread *McCarthy*'s concern with collateral attacks. *McCarthy* established a prophylactic rule of *per se* reversal in order to insure that there would be strict compliance with Rule 11 which would, in turn, minimize the number of later collateral attacks on voluntariness. This rationale is not undercut by *Timmreck* which held that collateral relief is not available for strictly technical violations of Rule 11. A collateral attack, like that in *Timmreck*, may be made years after a plea is entered. If a plea were to be vacated as the result of a collateral attack, it might be impossible to conduct a trial because of unavailable witnesses and destroyed evidence. This concern with the need for finality of a guilty plea which is sufficient to justify the limitation on collateral relief in *Timmreck*[168] is far less significant in a direct appeal which occurs within a short time period.[169]

Finally, the Committee contends that the interest in finality is sufficient to justify a harmless error standard. Though the Committee mentions the reasons for viewing the finality interests in this context as significant, it fails to justify its assertion that the finality considerations are sufficient to require a harmless er-

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[165] *Id.*

[166] *Id.* at 20.

[167] For 11(c)(2) through (5), a prepared speech, used in each plea proceeding, would insure compliance. Only 11(c)(1) demands a somewhat individualized speech. A judge could use a checklist to make sure that he missed nothing. *See* United States v. Carter, 619 F.2d 293, 299 (1980).

[168] United States v. Timmreck, 441 U.S. 780, 784-85 (1979); *See also* Henderson v. Kibbe, 431 U.S. 145, 154 n.13 (1977); Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[169] See note 143 *supra*.

ror standard. As indicated earlier,[170] the prejudice to the government in a case on direct appeal does not outweigh the benefits of a *per se* reversal rule. Though there might be some initial increases in costs resulting from repeated plea proceedings, the long term effect would undoubtedly be an increase in compliance with the rule, thus preserving the finality of guilty pleas. Furthermore, strict compliance would create adequate records which would help defeat subsequent collateral attacks while insuring that defendant's rights are consistently protected. The statement in the Advisory Committee Notes that subdivision (h) should not encourage judges to handle Rule 11 proceedings more casually[171] is an admirable concern. Unfortunately the change to a harmless error standard will probably create just that result.

The Advisory Committee Notes also include illustrations of those violations of the rule which would and would not be harmless error.[172] Those included as examples of harmless error are the cases where the determination of harmlessness is uncomplicated and the result would be the same under a stricter standard. For instance, the Committee suggests that when a judge does not mention some essential element of a crime but the defendant's response indicates that he understands that the element was involved in the crime, the judge's error would be harmless.[173] The Committee also states that the harmless error standard under subsection (h) does not encompass extreme or speculative claims of harmless error as in a case where a trial judge totally abdicates responsibility to the prosecutor for giving warnings.[174] The Committee does not, however, give direction for handling the cases that are not clear-cut. For example, the Committee does not address whether it is harmless error for the judge to omit one or two rights from the list of constitutional rights waived if the defendant does not allege that this failure had any impact on his plea.

By ignoring some of the more difficult examples, the Committee failed to define adequately the meaning of the harmless error standard in the context of a guilty plea. The standard recommended by the Committee is: any variance "which does not affect substantial rights shall be disregarded." It is not clear, however, what type of variance would be considered to affect substantial rights. The Committee Notes make reference to circuit court decisions that viewed as harmless any variance which "could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea."[175] The Committee does not clarify, however, whether this is the test that will be used and what the result would be of a failure to give one of the warnings in subsections (2), (3) or (4) under such a test. The determination of whether a defendant would have chosen to plead guilty, had he known, is itself inor-

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[170] See text accompanying and following notes 140-44 *supra*.

[171] *See Proposed Amendment*, *supra* note 156, at 22.

[172] *Id.* at 21-22.

[173] *Id.*

[174] *Id.* at 21.

[175] *Id.* at 18. *See, e.g.*, United States v. Coronado, 554 F.2d 166 (5th Cir. 1977).

dinately speculative. In addition, even though there may have been no impact on a defendant's decision to plead guilty, the waiver of a constitutional right alone might warrant reversal. To be valid under the due process clause, a waiver "must be 'an intentional relinquishment or abandonment of a known right or privilege.' "[176] Thus, a guilty plea made without the required warnings would constitute an unknowing waiver which would require reversal.

The failure to define "harmless error" in the context of a guilty plea creates the potential for inconsistent application of the new standard among and within circuits. It also creates the opportunity for courts to manipulate the standard to achieve desired results in particular fact situations. In summary, adoption of this harmless error standard would ignore the essentially prophylactic purpose of Rule 11.[177] As articulated in *McCarthy*, strict compliance with the rule is necessary in order to obviate the need for later voluntariness determinations. The choice to reject a harmless error standard may produce some cases where a conviction is vacated without the defendant having been prejudiced. Nevertheless, it would guarantee that relief is granted in all cases of prejudice without imposing an undue burden on the government. The next section will propose a workable standard that can be used in place of the harmless error standard. First, the section will show how the proposed standard can be used currently by the courts, incorporating all of the necessary criteria discussed in section III. The latter part of the section will suggest inclusion of this proposed standard into Rule 11 as a substitute for 11(h) as currently proposed.

V. Recommended Standard

Until Rule 11 is amended to include a standard, the courts must continue to confront the problem of what constitutes compliance and what should be the appropriate remedy for noncompliance with the rule as currently written. They must adopt an approach which carries out the intent of *McCarthy* and the 1975 amendments and which conforms to the policy behind the rule. The standard that the courts use must also be one which can be adhered to consistently without unduly burdening the court system. In addition, care must be taken to distinguish between what constitutes compliance with Rule 11 and what the remedy is for noncompliance with the rule.

It is submitted that courts should adopt an approach which will be labelled a "strict in context" approach. Basically, this approach would demand strict adherence to the requirements of Rule 11 and automatic reversal for noncompliance. It would, however, require that the determination of whether there was compliance with the rule be made in the context of the record and the

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[176] McCarthy v. United States, 394 U.S. 459, 466 (1969) *quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[177] A similar criticism has been advanced regarding the use of the harmless error standard in *Miranda* type situations. *See* KAMISAR AND LAFAVE, *supra* note 144, at 817.

posture of the case at the guilty plea proceeding. The only permissible deviations from requiring that the judge personally address each element of the rule would be (1) those situations where the defendant indicates on the record his understanding of the omitted advice and (2) those situations where, based on the posture of the case, any defendant had to have understood the rights being waived.

This recommended approach incorporates all of the elements suggested as necessary to an ideal standard. First, strict adherence to Rule 11 must be required in order to prevent ambiguity and to provide consistency. The vagueness of a standard requiring only substantial compliance with the rule contributes to inconsistent decisions, a lack of predictability, and complexity in reviewing records. Moreover, it is not clear whether there is substantial compliance if the judge completely fails to address one provision or if he partially complies with all provisions without fully complying with every one.[178] Requiring strict compliance with the rule will insure that district court judges understand what is demanded by the rule and will encourage careful and automatic adherence to its requirements.[179]

The second element of the recommended standard is that the context of the situation may be used in determining if there was compliance with the rule. This allows the court to conclude that the rule was complied with when the defendant's responses during the guilty plea proceeding indicate, on the record, his understanding of the specific Rule 11 subsection involved. It also enables the court to consider the posture of the case and determine if, based on the record, it would be impossible for the defendant to be unaware of the element of Rule 11 which the judge failed to mention. This "strict in context" approach addresses many of the situations which are often used to illustrate the absurdity of demanding literal compliance with the rule. For example, Rule 11 would be considered to be complied with when a defendant with appointed counsel pleads guilty in the middle of trial, even if the judge does not specifically advise him of his right to counsel at trial as required by Rule 11(c)(3).

This proposed standard does not allow for a determination of compliance to be based in any way on what the defendant actually knew or ought to have known, or on the absence of prejudice to the defendant. Under this standard,

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[178] See text and note at note 150 *supra*.

[179] Though an appellate court would undoubtedly want to indicate to the lower courts what it considered optimal compliance with the rule, this must be distinguished from the conduct necessary to comply with the existing rule. For example, a court may consider it optimal for the district court judge to have an extensive dialogue with the defendant regarding the nature of the charge in which the judge informs the defendant of all of the elements of the charge, the relationship of the law to the facts, the acts that must be proven to establish guilt, and possible affirmative defenses. In this dialogue, the defendant optimally would give more of an indication of understanding than a solitary response that he understands. The court might expect that the judge adjust his approach depending on the sophistication of the defendant and the complexity of the charge. There will be many cases, however, where the reading of the indictment with a single question to the defendant as to his understanding of the charge will suffice to comply with the rule.

therefore, there would have been a failure to comply with Rule 11 in *Michaelson*. In that case, the court concluded that the defendant must have known his right not to incriminate himself partly because it was "highly unlikely" that his competent attorney would not have so advised him.[180] Furthermore, the court determined that the defendant's plea of guilty did not result from a belief that he would be forced to incriminate himself.[181] The assessment of what the defendant must have known or what influenced his decision to plead guilty would not be relevant under the proposed standard. Since the trial judge in *Michaelson* failed to inform the defendant that he could not be compelled to incriminate himself and since the possibility exists that the defendant could have been unaware of this right, there was noncompliance with Rule 11. Using this approach, it is possible to develop a reasonable solution for most of the problem situations confronted by the courts.[182] The "strict in context" approach avoids the need to carve out exceptions to the rule of strict compliance on a case-by-case basis. Complicated factual determinations for each case which the *McCarthy* rule was designed to prevent are also avoided with this approach. It provides a standard which increases predictability and uniformity of application while encouraging consistent and complete adherence to the rule by trial court judges.

Finally, under this standard the judicial remedy for a failure to comply with Rule 11 should be automatic reversal. Not only would such a rule conform most closely to the dictates of *McCarthy* and the legislative intent in amending the rule, but it would strengthen the consistency of the rule's application. Particularly in the context of judicial compliance with a rule, the courts are in a unique position to affect compliance.[183] The approach of requiring strict compliance, with reversal for all instances of noncompliance, most effectively advances the important policy considerations inherent in the rule. Automatic reversal will insure uniform procedures for accepting pleas and greater consistency, predictability, and accuracy in reviewing the requests for reversal. It

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[180] 552 F.2d at 477.

[181] *Id.*

[182] Using this standard, some examples would be handled as follows: (a) Failure to give an 11(c)(5) warning regarding potential prosecution for perjury to a person questioned under oath, as in *Caston* and *Almaguer*, would constitute noncompliance with Rule 11. The language of the rule is clear and the context would not affect the defendant's awareness of a potential future perjury prosecution. The lack of prejudice to the defendant in not receiving the warning is irrelevant under this standard. (b) When a defendant is not placed under oath, an omission of an 11(c)(5) warning regarding potential prosecution for perjury would not constitute noncompliance with Rule 11. The language of 11(c)(5) can be interpreted as not requiring this warning where no oath is administered. The Advisory Committee has proposed a change to the wording of 11(c)(5) which, if adopted, would completely eliminate this problem. *Proposed Amendments*, *supra* note 156, at 5. (c) There would be compliance with Rule 11 when a defendant, pleading guilty in the middle of a jury trial, is not informed that he has a right to a jury trial as required by Rule 11(c)(3) since based on the posture of the case, the defendant could not be unaware of the right being waived.

[183] See text and note at note 155 *supra*.

will insure that later collateral attacks as to the voluntariness of the plea will be able to be disposed of more efficiently and that the defendant's rights are consistently safeguarded. The additional costs to the criminal justice system that this standard would generate in direct appeal cases are minimal when compared to the benefits to be gained.

The "strict in context" standard can be used immediately by the courts since it follows the mandate of *McCarthy*, the intent of the rule, and the policies behind the rule. Nevertheless, a standard incorporated into the rule would resolve the conflict among the circuits regarding the proper standard to be used. In light of all of the above considerations, the following substitute for the proposed Rule 11(h) should be considered:

> (h) COMPLIANCE. There must be strict adherence to the procedures required by this rule. Nevertheless, if,
> (1) based on the posture of the case, a warning could have no relevance to the defendant or the defendant could not be unaware of the right being waived or
> (2) the defendant indicates by his response that he understands that he is waiving a right,
> failure by the judge to personally inform him will not constitute noncompliance. On direct appeal, noncompliance will result in automatic reversal. On collateral attack, a harmless error standard will apply.

This approach resolves some of the problems most frequently cited in criticism of the automatic reversal rule. In a few instances, new plea proceedings and even trials may be granted to individuals who were not actually prejudiced by the error. Overall, however, this strict approach will improve uniformity and consistency in the application of the rule. As the Court so aptly stated in *McCarthy*:

> It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.[184]

CONCLUSION

A judicial standard of compliance and review for Rule 11 must follow the dictates of *McCarthy* and the language and intent of Rule 11 as amended in 1975. Both legislative and judicial standards must also insure that defendants' pleas are informed, voluntary, and entered with knowledge of the rights being waived and the consequences of the plea. The rule must encourage consistent adherence to its requirements without burdening the integrity of the judicial

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[184] 394 U.S. at 472.

system with unreasonable results reached under the rubric of literal compliance. The "strict in context" standard proposed in this note effectively incorporates these elements into a rational rule which will insure predictable and principled decisions while encouraging consistent adherence to Rule 11 by trial court judges.

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